No. 04-698

Supreme Court, U.S.
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In The Supreme Court of the United States

BRIAN SCHAFFER, a Minor,
by His Parents and Next Friends,
Jocelyn and Martin Schaffer, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent,
Montgomery County Public Schools, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, as found by the Court of Appeals below, the burden of proof in an administrative hearing brought under the Individuals with Disabilities Education Act is properly allocated to the party requesting the hearing.

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STATEMENT OF THE CASE

Background

Brian Schaffer is a disabled child as defined by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.* He was born on May 13, 1994, and attended the Green Acres School ("Green Acres"), a private non-special education school from pre-kindergarten through the 1997-98 school year when he completed his seventh grade. He was placed there by his parents and had never been previously enrolled with the Montgomery County Public Schools ("MCPS"), much less received special education services from MCPS. App.124.

On November 7, 1997, Brian's mother contacted Linda Brand, an MCPS special education teacher at Herbert Hoover Middle School ("Hoover") and requested that MCPS assess Brian to determine if he was eligible for special education services. During this conversation Brian's mother stated that she had to find another private school for Brian to attend. App.125-126. Over the next two months the parents hired persons to assess Brian's educational abilities and submitted those assessments to MCPS.

On December 30, 1997, before Brian's testing was complete and before MCPS had a chance to draft an Individualized Education Program ("IEP") for Brian, the parents filed an application with the McLean School, a private, non-special education school, seeking Brian's admission for the 1998-99 school year. On March 1, 1998, Brian was accepted at the McLean School for the 1998-99 school year. App.129.

Within two weeks, and well before MCPS had an opportunity to offer the parents an IEP, the parents paid

$750.00 to the McLean School as a non-refundable enrollment fee for the 1998-99 school year. App.129-30.

MCPS convened IEP meetings on February 26, 1998, and April 6, 1998. After having considered all of the available records and documentation, the IEP team identified Brian as a student with a speech-language disability and a learning disability. The team developed an IEP and recommended that Brian attend the Hoover Middle School ("Hoover"), Brian's neighborhood school, for the 1998-99 school year. App.132-134.

The proposed program included 15.3 hours of special education services per week and 45 minutes of speech-language therapy per week. App.128-133. The special education services would have been provided in an "inclusion model," where World Studies, Science and English classes would be co-taught by a special educator and a general educator. App.134. The special education teacher would focus on and provide services to the five or six students in the class who had IEP's. App.134. The speech-language therapy would have been provided in a small group of between two and five students. App.134. Under the proposed program, Brian would also have received an additional 45 minutes of intensive reading and writing support from a special education resource teacher in a small self-contained class of between six and eight students. App.134. The parents declined to visit and observe the proposed program at Hoover Middle School. App.135. (The Petitioners' characterization of larger class sizes as forming the centerpiece of the proposed program is thus inaccurate. Petition, p.6.)

Petitioners state that in making its recommendation, the school system rejected the conclusions of the parents' private evaluators. Petition, p.5. However, the school district did in fact consider the information the parents had

presented. The IEP team had reviewed the private evaluations provided by the parents and incorporated the test results and recommendations of the testing in developing the IEP. In fact, after the parents rejected the proposed placement at Hoover, school officials offered a second option - implementing the IEP at the Frost Middle School ("Frost"), which was only ten minutes from Brian's home, and where there were more small self-contained classes. App.134-35.

Thus, MCPS fully took into consideration the views of the parents and their experts and offered two appropriate programs for the student. The parents rejected both programs, and placed Brian at the McLean School, a private school that was not certified by the Maryland State Department of Education as an approved special education school. App.137. The McLean School accepts regular education students and students who *do not* have severe learning disabilities. App.137.

Petitioners inaccurately state the school district's staff were "less informed" about the student's needs than were the parents' experts. Petition, p.5. In fact, MCPS school officials had a greater knowledge base about the child than the parents' experts. For example, Linda Brand, the MCPS special education expert reviewed the private reports submitted by the parents, met with the child, administered educational testing and prepared goals and objectives that incorporated the needs identified in the reports of Dr. Ruth Spodak and Dr. Carol Kamara, the parent's experts. App.129-30. Pamela Zahra, the MCPS speech pathology expert met with the child, conducted an informal assessment, tested the child's phonological skills and prepared goals and objectives that incorporated the needs identified in Dr. Kamara's report. App.130-31. Likewise, Dr. Butera, the MCPS psychologist and Doris Shierly, another special education expert from Frost,

reviewed the child's records, conducted testing and were of the opinion that both programs recommended by MCPS could appropriately implement the proposed IEP. App.32-33; 134-36.

In stark contrast, the parents experts had spent minimal time with Brian and they had not observed the programs proposed by MCPS. App.149-50. Indeed, Dr. Spodak had spent only ten minutes with Brian. App.150. Like Dr. Spodak, Dr. Kamara had no first hand knowledge of the proposed programs at Hoover or Frost. App.153. The ALJ found the testimony of both the parents' expert witnesses lacking in probative value. App.150, 153.

PROCEEDINGS BELOW

The Schaffers initiated a due process hearing under the IDEA on May 26, 1998, seeking funding for their unilateral placement of the student at the non-approved McLean School for the 1998-1999 school year.

After reviewing the applicable case law on burden of proof, ALJ Nichols found that the burden of proof should be on the parents as the party attacking the IEP. App.146. Judge Nichols cited *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) and *Tice v. Botetcourt*, 908 F.2d 1200, 1207 (4th Cir. 1992) and held that once a procedurally proper IEP has been formulated, reviewing authorities should be reluctant indeed to second guess the judgment of education professionals. App.145.

In his July 9, 1998, decision, ALJ Nichols, found in favor of MCPS and determined that "the child would obtain significant, measurable educational benefit during the 1998-99 school year" if he attended either Hoover or Frost. App.56. The ALJ concluded "[a]s a matter of law that the

goals and objectives, special education and related services, called for by the April 6, 1998, IEP, and the placement(s) for the Child offered by MCPS, affords the Child an opportunity for a FAPE for the 1998-99 school year as required by the IDEA." App.157.

The ALJ further found that with regard to the parents' participation in the IEP process, such:

> was a mock effort on the part of the Parents ... [which] strongly suggests a design by the Parents to simply obtain funding from MCPS for their predetermined decision to have the child enter the 8th grade at the McLean School of Maryland. The parents never approached their interaction with MCPS as a partnership in educating the child as a student with disabilities. The parents may have followed the letter of their obligations under the IDEA, however, their activities are inconsistent with the congressional intent behind the statute.

App.146, n.6.

The parents appealed the ALJ's decision to the United States District Court on January 5, 1999. Both parties filed motions for summary judgment. On March 16, 2000, the district court issued a memorandum opinion and order leaving intact the ALJ's decision concerning the appropriateness of the MCPS IEP and placement. However, the court concluded that in a case involving an initial IEP, the school district should have had the burden of proof at the administrative hearing stage. App.54, 68. Accordingly, the court remanded the case to the ALJ.

On April 14, 2000, MCPS filed a notice of appeal with the United States Court of Appeals for the Fourth

Circuit arguing that the lower court erred in assigning the burden of proof to MCPS.

On October 25, 2000, while the appeal to the Fourth Circuit was pending, a hearing was reconvened before ALJ Nichols. No new evidence was admitted. Rather, only oral argument was presented. Based solely on the reallocation of the burden of proof ordered by the district court, and despite the absence of any new evidence, ALJ Nichols reversed his earlier findings and concluded that MCPS had not offered the student a FAPE for the 1998-1999 school year. App.70. However, noting that tuition reimbursement was a form of equitable relief, and finding that the parents would have rejected any public school placement offered by MCPS, ALJ Nichols ordered that the parents be reimbursed for only one half of the McLean School tuition for the 1998-1999 school year. App.110-115.

On February 5, 2001, the United States Court of Appeals for the Fourth Circuit vacated and remanded the March 16, 2000 decision of the district court, directing the district court to consolidate and consider the burden of proof issue with the merits of the case. App.50.

On remand, and with the parties each appealing the ALJ's second decision, the district court issued a memorandum opinion and order dated November 25, 2002. The district court affirmed that portion of the ALJ's second decision that found that MCPS had not offered a FAPE available to the student; reversed the ALJ's decision awarding the Schaffers only one-half of the McLean School tuition; and directed MCPS to pay the full tuition for the 1998-99 school year. The district court also denied the parents' request for tuition reimbursement for thee 1999-2000 and 2000-2001 school years because the parents had not exhausted their administrative remedies as to those school years. App.21, 47-8.

Regarding the burden of proof issue, the district court restated its earlier position and found that in hearings involving initial IEP's the burden of proof should be on the district, and in cases where there is an existing IEP the burden should be on the party proposing a change. App.40. The court declined to address situations where both parties have proposed a change. App.33, n.5.

MCPS again noted an appeal to the Court of Appeals for the Fourth Circuit. In a comprehensive opinion, the Fourth Circuit determined that there was "no reason to depart from the general rule that a party initiating a proceeding" bears the burden of proof. App.15. The Court of Appeals did not place the burden of proof on the parents in all instances. Rather, parents, like school systems, will bear the burden of proof if they request a hearing. The case was again remanded to the district court, which has stayed the case pending disposition of the instant Petition for Certiorari. App.163.

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Petitioners have presented no compelling reason for the Court to exercise its discretion in granting the writ.

I. THERE IS NO REASON TO DEPART FROM THE GENERAL RULE THAT A PARTY INITIATING AN ACTION HAS THE BURDEN OF PROOF

A. The IDEA offers parents and children numerous protections.

The IDEA is silent as to which party bears the burden of proof in an administrative hearing brought under the IDEA. When a statute is silent, the burden of proof is generally allocated to the party requesting the hearing and seeking relief. *See, e.g.*, J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999); *Dalton v. Capital Assoc. Indus. Inc.*, 257 F.3d 409, 416 (4th Cir. 2001); *Newport News Shipbuilding & Dry Doc Co. v. Loxley*, 934 F.2d 511, 516 (4th Cir. 1991); *Edison v. Department of the Army*, 672 F.2d 840, 842, (11th Cir. 1982). That allocation is also proper in IDEA administrative hearings.

Seeking to evade the strictures of this general rule, the Petitioners assert that the burden of proof should be viewed as one of the substantive educational rights afforded to children with special needs under the IDEA. Absent this right, Petitioners posit that school systems will "ratchet down" services from previously agreed upon levels; "negotiation dynamics" will be tilted towards the school system; and parents will find the hearing process "too daunting and simply capitulate." Petition, pp.28-29.

These asserted fears are fanciful and overlook the obvious: this Court has already established the substantive level of services that are to be afforded children with disabilities under the IDEA. In *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), the Court held that the Act requires that school systems design a program that is reasonably calculated to confer some educational benefit to the disabled student. *Rowley*, 102 S. Ct. at 3048. This level of

service does not wax and wane with the allocation of the burden of proof.

Moreover, if a school system did recommend that a student receive a decreased level of special education services, the parents could request an administrative hearing to contest the reduction. During the pendency of the administrative and judicial proceedings, the school system is required to maintain the previously agreed upon level of services pursuant to the "current educational placement" provision of the IDEA. 20 U.S.C. § 1415(j). *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 3 (1st Cir. 1999); *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 695 (5th Cir. 1996); *Wagner v. Board of Education of Montgomery County*, 335 F.3d 297, 301 (4th Cir. 2003); *Drinker v. Colonial Sch. Dist.*,78 F.3d 859, 864_65 (3d Cir. 1996); *Zvi D. v. Ambach*, 694 F.2d 904 (2d Cir. 1982). Thus, a school system could not "ratchet down" levels of service unless such was found to be appropriate through the administrative and judicial review process.

Petitioners' assertion that parents will find the hearing process "too daunting and simply capitulate" if school systems are not allocated the burden of proof is without merit. Petition, pp.28. It is highly unlikely that a parent who believes that his or her child is not receiving sufficient services will forgo a challenge merely because of an evidentiary rule that is common to most litigants. Further, when a parent requests an administrative hearing, the IDEA requires that the school system "inform the parent of any free or low-cost legal and other services available in the area". 34 C.F.R. § 507(a)(3). Thus, there are protections built into the IDEA to protect the student, and assist the parents, with the hearing process.

Petitioners state that allocation of the burden of proof "can effect the outcome much earlier in the process"

as such will change the "negotiation dynamics" of the IEP process. Petition, p.29. Petitioners' speculation in this regard is again flawed. IEP teams, of which parents are members, develop the substance of an IEP by considering the educationally-relevant information brought to the IEP meeting. 34 C.F.R. §§ 300.345, 300.346(a). An IEP is not generated based upon allocation of the burden of proof. Further, parents may bring to the IEP meeting any persons who have knowledge or expertise regrading the child. 34 C.F.R. § 300.344(a)(6). Prior to any IEP meeting, the parents are also entitled to inspect and review any education record relating to their child. 34 C.F.R. § 300.562(a). Thus, parents come into IEP meetings well prepared for the discussions that occur as part of the IEP development process. If there is an aspect of the IDEA that changes the "negotiation dynamics" between the parties, it is the understanding that the parents, if they prevail in a dispute regarding their child's education, will be able to recover their attorney's fees from the school system. 34 C.F.R. § 300.513.

Petitioners erroneously state that placing the burden of proof on parents would "undermine IDEA's provisions that ensure parents meaningful participation in developing the IEP." Petition, p.11. The burden of proof plays no role in the educational decision making process at the school level as Petitioners contend. The burden of proof only comes into play if and when a party initiates a hearing and a hearing is held. Indeed, in the present case, ALJ Nichols found that the parents "fully participated" in the development of their child's IEP. App.132. Allocation of the burden of proof played no role in this participation.

Further, the IDEA contains explicit provisions which ensure that parents participate meaningfully in the creation and revision of their child's IEP. School systems are required to "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP

meeting" including notifying the parents "early enough to ensure that they will have an opportunity to attend" and by "scheduling the meeting at a mutually agreed on time and place." 34 C.F.R. § 300.345(a). An IEP meeting can only be held without a parent's participation "if the public agency is unable to convince the parents that they should attend." 34 C.F.R. § 300.345(d). In this event, the school system must document its efforts to secure the parents' attendance. *Id.*

In yet another speculation, Petitioners claim that families will relocate from one state to another depending upon who has the burden of proof in the administrative hearing. Petition, p.29. There is no basis for this claim. School officials are obligated to develop appropriate IEP because the IDEA requires them to do so, 20 U.S.C. § 1414(d), not because of some rule of evidence in a legal proceeding. Families move from one state to another, from one county to another, and even from one neighborhood to another, based upon the reputation of the school system. The school system in Montgomery County Maryland is nationally recognized as one of the country's premier school systems. Petitioners' assertion that families will move to the District of Columbia to take advantage of the burden of proof scheme in that locale is specious. Petition, p.29.

Petitioners contend that the burden of proof should be placed on school systems in all IDEA administrative proceedings to provide "an additional incentive" for compliance with the law. Petition, p.12. As the instant case illustrates, school systems already have such an incentive. If the school system is found not to have complied with the law, it will be required to fund the student's unilateral placement at the non-approved McLean School. *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993); *School Comm. of Burlington v. Department of Ed. of Mass*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). In addition, the school system will be

required to reimburse the parents for the attorney's fees that they have incurred. 34 C.F.R. § 300.513. Thus, the IDEA already contains "incentives" to ensure compliance with its provisions. Further, the notion that educators need the incentive Petitioners request is demeaning. Educators enter the profession to help students achieve, not to hinder their learning.

Petitioners claim that the remedial function of the IDEA will not be served unless the burden of proof is placed upon school systems in all instances. Petition, p.16. However, as the Court of Appeals noted, there are a number of remedial federal statutes whose functions are aptly served even when the burden of proof is on the party seeking the statutory protection. See App.8, referencing Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Notwithstanding this backdrop Petitioners states that the "special challenges" faced by students with disabilities warrants a special protection, albeit one not contained in the statute. As set forth below, however, Congress has already determined which special protections are necessary to effectuate the IDEA's purpose.

Congress' decision not to allocate the burden of proof to school systems in every administrative hearing is noteworthy given the variety of other rights afforded to parents under the IDEA. The IDEA is a comprehensive law that requires educational agencies to identify, evaluate and then provide a free appropriate public education to eligible children from birth through age 21. 20 U.S.C. § 1400, *et. seq.* There are numerous procedural and substantive provisions in the IDEA that protect children and parents.

By way of example, the IDEA mandates that parents be involved in decision making for their child throughout the educational process. Parents are members of the IEP

team. 20 U.S.C. § 1414(d). Parents have the right to disagree with a school district's evaluation and request an independent evaluation at the school district's expense. 20 U.S.C. § 1415(b)(1). Parents have the right to inspect and review all education records in the possession of the school district related to the development of an IEP. 20 U.S.C. § 1415(b). A school system is required to provide parents with notice of an initial referral for evaluation; each IEP meeting; a reevaluation of their child; and upon registering a complaint. 20 U.S.C. § 1415(d)(1). The procedural safeguards notice must contain a full explanation of the procedural safeguards and be written in an "easily understandable manner" 20 U.S.C. § 1415(d)(2).

When there is a dispute, voluntary mediation is available. 20 U.S.C. § 1415(e). If parents request a hearing they have the right to counsel and to experts; the right to present evidence and cross-examine and compel the attendance of witnesses; and the right to a verbatim record of the hearing. 20 U.S.C. § 1415(h). The school system must provide parents with a list of free or low-cost legal services in their area. 34 C.F.R. § 300.507(a)(3). Parents must receive, at least 5 business days before a hearing, any evaluations the district will use in a hearing. 20 U.S.C. § 1415(f)(2). As noted, during the pendency of the administrative and judicial review process, the student is to continue to receive the previously agreed upon levels of service. 20 U.S.C. § 1415(j). Parents may be awarded attorney's fees if they prevail in those proceedings. 20 U.S.C. § 1415(i)(B).

The Fourth Circuit summarized the essence of the full panoply of educational protections and rights parents and children have under the IDEA:

> The IDEA and its implementing regulations require an open process that makes relevant information and special services, such as the independent evaluation, available to parents. By the time the IEP is finally developed, parents have been provided with substantial information about their child's educational situation and prospects. They have continuing access to information and anticipated evidence once a hearing is requested. In sum, Congress has taken into account the natural advantage a school system might in the IEP process, including the administrative hearing, by providing the explicit protections we have outlined. As a result, the school system has no unfair information or resource advantage that compels us to reassign the burden of proof to the school system when the parents initiate the proceeding.

App.11.

The myriad procedural protections afforded to children and parents in the IDEA further serves to ensure that a student's IEP is substantively appropriate. The IEP is the blueprint and "modus operandi" for providing a FAPE to disabled students. *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 2001_02, 85 L. Ed. 2d 385 (1985). The IEP is also considered the "centerpiece of the [IDEA's] education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). In *Rowley, supra*, the Court held that "adequate compliance with the procedures prescribed [by the IDEA] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 102 S.

Ct. at 3050. Accordingly, adherence to the IDEA's procedural protections also serves to ensure a substantively appropriate educational program, which is the ultimate goal of the statute. Allocating the burden of proof to the party requesting an administrative hearing does not undermine this goal.

Congress did not include the burden of proof among the many protections already afforded parents in the IDEA. As such, there is no reason to depart from the general rule that a party initiating a proceeding should bear the burden of proof.

B. Allocation of the burden of proof in IDEA administrative proceedings should be left to the states.

The IDEA has frequently been described as a model of "cooperative federalism." *Taylor v. Vermont Dept. of* Educ., 313 F.3d 768, 776 (2nd Cir. 2002); *Little Rock School District v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999); *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 151 (3rd. Cir. 1994); *Town of Burlington v. Department of Education*, 736 F.2d 773, 783-84 (1st Cir. 1984), *aff'd sub nom. Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). As stated in *Taylor, supra*:

> The Act does not usurp the states traditional role in setting educational policy, however. Rather, it is left to the individual states to determine how to implement the statute's goals. *Burlington Dep't of Educ.*, 736 F.2d 773, 784 (1st Cir. 1984) ("'Cooperative federalism' in this context, then, allows some substantive differentiation among the states in the determination of which educational theories, practices, and approaches will be utilized for

> educating disabled children with a given impairment.") *aff'd sub nom. Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). ... "**It seems plain that the Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filling in the numerous interstices within the federal Act through their own statutes and regulations.**" *Burlington*, 736 F.2d at 785.

Taylor, 313 F.3d at 777. Emphasis supplied.

Pursuant to this model of cooperative federalism, the states retain the authority to promulgate substantive and procedural requirements that embellish existing rules or that speak to matters where the statute is silent. The IDEA is not a "one size fits all" statute. In enacting the IDEA, Congress left the states with ample room to develop their own rules and regulations regarding the free appropriate public education that is to be afforded disabled students. It would thus be inappropriate for this Court to impose a nationwide rule upon the states regarding the burden of proof at administrative hearings.

The individual states have enacted statutes and regulations to accomplish the "shading and tinting" of the IDEA referenced above. Perhaps the most significant substantive differentiation amongst the states lies in the level of educational benefit that must be provided to disabled students.

In *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), the Court stated that the "intent of the Act was more to open the door of public education to handicapped

children on appropriate terms than to guarantee any particular level of education once inside." *Rowley*, 102 S. Ct. at 3043. "Congress sought primarily to identify and evaluate handicapped children and to provide them with *access* to a free public education." *Rowley*, 102 S. Ct. at 3048. Emphasis supplied.

The Court held that "the requirement that a State provide specialized educational services to handicapped children generates *no additional requirement* that the services so provided be sufficient *to maximize each child's potential* 'commensurate with the opportunity provided other children.'" *Rowley*, 102 S. Ct. at 3046. Emphasis supplied.

The Court concluded that, substantively, the IDEA's goal of providing a free appropriate public education is met where the disabled child is offered a program that is reasonably calculated to provide the child with "some educational benefit." *Rowley*, 102 S. Ct. at 3048.

Some states have opted to exceed the IDEA's "some educational benefit" requirement. For example, North Carolina's special education law has been construed as requiring that disabled children "should be given an opportunity to achieve [their] full potential commensurate with that given other children." *Harrell v. Wilson County Schools*, 58 N.C.App. 260, 265, 293 S.E.2d 687, 690 (1982). *See also, Burke County Board of Education v. Denton*, 895 F.2d 973, 983 (4th Cir. 1990) (recognizing higher North Carolina educational standard). Massachusetts requires the provision of special education programs that "assure the maximum possible development of a child with special needs." *Stock v. Massachusetts*, 392 Mass. 205, 211, 467 N.E.2d 448, 453 (1984). *See also, David D. v. Dartmouth School Committee*, 775 F.2d 411, 423 (1st Cir. 1985) (recognizing higher Massachusetts educational standard). New Jersey special education law requires "local school boards to

provide educational services according to how the student can best achieve success in learning." *Bd. of Educ. of the East Windsor Regional School Dist. v. Diamond*, 808 F.2d 987, 992 (3d. Cir. 1986); *Geis v. Bd. of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 583 (3rd Cir. 1995) ("New Jersey imposes a higher standard of special education than that required by the Act.") Michigan special education law has also been held as requiring "something more than the basic federal minimum." *Barwacz v. Michigan Department of Education*, 674 F. Supp. 1296, 1304 (WD Mich. 1987).

Thus, as illustrated above, there is a significant variation between the states as to the substantive level of services that are afforded to children with disabilities. The IDEA does not preclude this variation. If the IDEA does not require a uniform national rule as to the substantive level of services to be provided, there is not, as Petitioners contend, "a manifest need for a uniform national rule on the burden of proof." Petition, p.29.

In fleshing out the IDEA's procedural components, a number of states have enacted laws that specifically address which party bears the burden of proof in administrative proceedings. The differentiation amongst the states regarding the burden of proof issue again reflects the cooperative federalism that animates the IDEA. In Georgia, allocation of the burden of proof is dependent upon the specific issue to be tried. Georgia special education law provides that:

> Generally, the [local school system/state-operated program] shall bear the burden of coming forward with the evidence and burden of proof at any administrative hearing to establish that the proposed IEP is appropriate and provides FAPE. If the parents propose a placement that is more restrictive than provided by an existing, agreed upon IEP, the parents shall bear the burden of establishing that the more restrictive environment is appropriate. Consistent with the provisions of Rule 160-4-7-.18(g)(2)(f)(5), in hearings which address the issue of whether a student's behavior in a disciplinary matter constitutes a manifestation of the students disability, the school system shall bear the burden of coming forward and the burden of proof. The ALJ shall retain the discretion to modify and apply these general principles to conform with the requirements of law and justice in individual cases under unique or unusual circumstances as determined by the ALJ.

Georgia Administrative Code, Rule 160-4-7-.18(1)(g)(8).

In Minnesota, in tuition reimbursement cases, the burden of proof is on the party seeking a finding of appropriateness as to that parties' proposed program. The Minnesota Education Code at Section 125A.091.16 provides that:

> The burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment. If the district has not offered or provided a free appropriate public education in the least restrictive environment and the parent wants the district to pay for a private placement, the burden of proof is on the

> parent to demonstrate, by a preponderance of the evidence, that the private placement is appropriate.

In West Virginia, the burden of proof appears to be placed upon the school system in all cases. West Virginia law provides that:

> The burden of proof as to the appropriateness of any proposed action, as to why more normalized placement could/could not adequately and appropriately service the individual's educational needs, and as to the adequacy and appropriateness of any test or evaluation procedure, will be upon school personnel recommending the matter in contention.

West Virginia Board of Education Regulations, Section 126-16-8.1.11c.

Alabama requires its education agencies in due process hearings to "[a]ssume the burden of proof regarding the appropriateness of services proposed or provided." Alabama Administrative Code, Chapter 290-8-9-.8(8)(c)6(ii)(I). In Arkansas, at "the beginning of the hearing, the hearing officer shall determine which party bears the burden of proof in regard to the particular issues raised." Arkansas Education Department Regulations, Section 10.01.28.1. In the District of Columbia, the local education agency "shall bear the burden of proof, based solely upon the evidence and testimony presented and testimony presented at the hearing, that the action or proposed placement is adequate to meet the educational needs of the student." D.C. Mun. Regs. Title 5, § 3030.3.

Congress recently reauthorized the IDEA and on December 3, 2004, President Bush signed the Individuals with Disabilities Education Improvement Act of 2004 into law. In reauthorizing the IDEA, Congress once again declined to impose a burden of proof scheme upon the states. Instead, Congress elected to allow the states to decide how the burden of proof should be allocated in administrative hearings. Thus, Congress has consistently opted not to completely intrude upon the states' traditional authority to regulate their educational affairs. In areas such as the allocation of the burden of proof, the states retain the authority to promulgate their own rules. Accordingly, it would be improper for this Court to usurp the states' authority by imposing a blanket rule in this matter.

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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